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IN THE

Supreme Court of the United States

OCTOBER TERM, 1953.

No. 187

HUBERT VAN HOOK,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

HUBERT VAN HOOK,
Petitioner.

THE DARNELL-WARREN PRINTING COMPANY, CHICAGO

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PETITION FOR A WRIT OF CERTIORARI.

MAY IT PLEASE THE COURT:

Your petitioner, Hubert Van Hook, respectfully prays that a writ of certiorari may issue to the United States Court of Appeals for the Seventh Circuit to review its opinion and judgment reversing a judgment of the District Court which allowed to petitioner the benefits of Section 107 (a) of the Internal Revenue Code in respect of compensation for personal services covering a period of more than thirty-six months all of which was received in the year 1946 by a partnership (as defined in the Code) of which petitioner was a member.

STATEMENT.

An attorney worked on certain litigation over a period of 53 months ended in February 1946. After 40 months the attorney asked petitioner, another attorney, to join him as a principal. Petitioner did so, and they worked together

on the litigation in partnership as joint venturers for the remaining 13 months until its conclusion, when the partnership received its fee and the fee was divided (R. 36-37). In his income tax return for 1946 petitioner spread his share of the fee ratably over the 53 months from the commencement until the conclusion of the litigation. The Bureau of Internal Revenue denied that petitioner was entitled to the benefits of I. R. C. Sec. 107 (a), and proposed a deficiency which petitioner paid. Upon denial of his claim for refund petitioner began this suit for refund of the deficiency so paid, the District Court gave judgment for petitioner, and the Court of Appeals reversed.

OPINIONS BELOW.

The opinions of the District Court appear at pages 22-24 and 36-38 of the record and are reported in 108 F. Supp. 32 and 107 F. Supp. 499. The opinion of the Court of Appeals appears at pages 46-50 of the record and is reported in 204 F. 2d 25.

JURISDICTION.

The judgment of the Court of Appeals was entered on May 13, 1953 (R. 50). The jurisdiction of this Court is invoked under 62 Stat. 928, 28 U. S. C. A. § 1254 (1).

STATUTE AND REGULATION INVOLVED.

Internal Revenue Code:

Sec. 107 (a) [added by Revenue Act of 1939, c. 247, Title II, Sec. 220 (a), 53 Stat. 878; as amended by Revenue Act of 1942, c. 619, Title I, Sec. 139 (a), 56 Stat. 837]:

> "(a) Personal Services. If at least 80 per centum of the total compensation for personal services covering a period of thirty-six calendar months or more

(from the beginning to the completion of such services) is received or accrued in one taxable year by an individual or a partnership, the tax attributable to any part thereof which is included in the gross income of any individual shall not be greater than the aggregate of the taxes attributable to such part had it been included in the gross income of such individual ratably over that part of the period which precedes the date of such receipt or accrual."

Sec. 3797 (a) (2) [as effective prior to amendment by Revenue Act of 1951, 65 Stat. 511]:

"(a) When used in this title, where not otherwise distinctly expressed or manifestly incompatible with the intent thereof—

• • • • •

"(2) Partnership and Partner. The term 'partnership' includes a syndicate, group, pool, joint venture, or other unincorporated organization, through or by means of which any business, financial operation, or venture is carried on, and which is not, within the meaning of this title, a trust or estate or a corporation; and the term 'partner' includes a member in such a syndicate, group, pool, joint venture, or organization."

Treasury Regulations 111, promulgated under the Internal Revenue Code:

"Sec. 29.107-1. Personal Services:

• • • • •

"It is not necessary, in order for section 107 (a) to be applicable, that the individual who includes in his gross income compensation for such personal services be the person who renders the services. For example, a partner who shares in the compensation for such personal services rendered by the partnership may be entitled to the benefits of section 107 (a), notwithstanding that he took no part in the rendering of such services."

QUESTION PRESENTED.

May a tax benefit, unequivocally conferred by the plain terms of the Internal Revenue Code, be denied because those plain terms are deemed to be inconsistent with an assumed intention of the legislature?

REASONS FOR GRANTING THE WRIT.

The discretionary power of this Court to grant a writ of certiorari is invoked upon the following grounds:

(1) The decision of the present case by the Court of Appeals for the Seventh Circuit is in conflict with decisions of other Courts of Appeals. *Commissioner* v. *Marshall* (C. A. 3rd) 185 F. 2d 674, affirming 14 T. C. 90, *Commissioner* v. *Nielson* (C. A. 9th), 187 F. 2d 233, *Hofferbert* v. *Marshall* (C. A. 4th), 200 F. 2d 648.

(2) An important question of income tax law is involved which has not been, but should be, settled by this Court.

Wherefore, it is respectfully submitted that this petition for a writ of certiorari to the Court of Appeals for the Seventh Circuit should be granted.

Respectfully submitted,

HUBERT VAN HOOK,
Petitioner.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1953.

No. .....

HUBERT VAN HOOK,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI.

STATEMENT OF THE CASE.

The essential facts of the case are stated in the accompanying petition.

JURISDICTION.

The jurisdiction of this Court is shown in the accompanying petition.

OPINIONS BELOW.

The opinions of the District Court appear at pages 22-24 and 36-38 of the record and are reported in 108 F. Supp. 32 and 107 F. Supp. 499. The opinion of the Court of Appeals appears at pages 46-50 of the record and is reported in 204 F. 2d 25.

SPECIFICATION OF ERRORS.

If a writ of certiorari is issued, petitioner intends to urge that the Court of Appeals for the Seventh Circuit erred—

(1) In holding that petitioner was not entitled to invoke the special benefits of I. R. C. Sec. 107 (a).

(2) In refusing to affirm the decision of the District Court that petitioner came plainly within the unequivocal terms of the section, and so was entitled to judgment.

ARGUMENT.

Petitioner's Situation Comes Plainly Within the Unequivocal Provisions of I. R. C. Sec. 107 (a), and in Such Case There Is No Room for Construction.

Concededly, "provisions granting special tax exemptions are to be strictly construed," *Helvering* v. *Northwest Steel Rolling Mills,* 311 U. S. 46, 49. But equally well settled is the proposition that an exemption plainly granted must be allowed, *Crooks* v. *Harrelson,* 282 U. S. 55, 59-61.

Here, the District Court found as facts that in September 1941 Thomas C. McConnell, an attorney, began work on a lawsuit, that in February 1945 petitioner, also an attorney, began working on the case with McConnell at the latter's request, that each had an interest in the outcome of the case, and that there was an express understanding between McConnell and petitioner in 1945 that each was to share in the profits or expenses of the litigation. The court concluded that a joint venture existed which qualified as a partnership under I. R. C. Sec. 3797 (a) (2) and 107 (a) (R. 36-38). The Court of Appeals recognized that a joint venture existed but refused to give it effect (R. 48).

As originally added to the Internal Revenue Code by the Revenue Act of 1939 Section 107 provided:

> "In the case of compensation (a) received, for personal services rendered by an individual in his individual capacity, or as a member of a partnership, and covering a period of five calendar years or more from the beginning to the completion of such services, (b) paid (or not less than 95 per centum of which is paid) only on completion of such services, and (c) required to be included in gross income of such individual for any taxable year beginning after December 31, 1938,

> the tax attributable to such compensation shall not be greater than the aggregate of the taxes attributable to such compensation had it been received in equal portions in each of the years included in such period."

In *Lindstrom* v. *Commissioner*, (C. A. 9th), 149 F. 2d 344, cited by the Court of Appeals (R. 49), Eckman started work for certain clients in April 1933. On May 1, 1936 Eckman and Lindstrom formed a law partnership. In 1940 their fee was agreed to, received, and divided between them. The court refused to allow Lindstrom to spread his share, because he and the partnership had no share in earning the fee prior to May 1, 1936, pointing out (p. 346) that:

> "The subsequent amendment of this section by Section 139 of the Revenue Act of 1942 does not apply as it relates only to taxable years beginning after December 31, 1940."

and saying (p. 346):

> "The only way Lindstrom could meet the requirements of Section 107 would be to tack Eckman's prior individual services onto the services later rendered by the partnership."

In applying Section 107(a), as amended in 1942, to the instant case, which involves closely similar facts, the Court of Appeals said (R. 50):

> "We hold that the taxpayer was not entitled to tack the prior period of services rendered by McConnell to the subsequent period of services performed jointly by McConnell and taxpayer."

This language erroneously applies Section 107 as originally enacted and not as amended in 1942, because under the section as amended the issue as to "tacking" cannot arise.

In *Elder W. Marshall*, 14 T. C. 90, affirmed and approved by the Third Circuit in *Commissioner* v. *Marshall*, 185 F. 2d 674 and approved in *Commissioner* v. *Nielson*, 187 F.

2d 233 by the Ninth Circuit which had decided *Lindstrom* v. *Commissioner*, 149 F. 2d 344, the Tax Court pointed out (p. 93) that:

> "A comparison of the language of the section before and after the amendment demonstrates * * * that emphasis was reversed by the new provision and was removed from the person who renders the services to the person who is required to report the income."

The Tax Court also quoted a statement fully supported by decisions of this Court (14 T. C. 94) that:

> "The will of Congress has been plainly expressed in language that does not permit or require a strained or unnatural interpretation. The words of the statute may not be extended or distorted beyond their plain, popular meaning, *Lindstrom* v. *Commissioner*, 149 F. 2d 344, 346."

Similar views were recently expressed by the Fourth Circuit in *Hofferbert* v. *Marshall*, 200 F. 2d 648, which said (p. 650):

> "That the section as amended in 1942 is applicable to income not earned by the taxpayer does not admit of question."

CONCLUSION.

From the foregoing it is apparent that there is a head-on conflict of decision between the Third, Fourth and Ninth Circuits on the one hand and the Seventh Circuit on the other, and that an important question of income tax law is involved which has not been, but should be, settled by this Court.

It is, therefore, respectfully urged that this petition for certiorari should be granted.

Respectfully submitted,

HUBERT VAN HOOK,
Petitioner.

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In the Supreme Court of the United States

OCTOBER TERM, 1953

No. 187

HUBERT VAN HOOK, PETITIONER

v.

THE UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the District Court denying the taxpayer's motion for summary judgment (R. 22-24) is reported in 108 F. Supp. 32, and the opinion rendering judgment for the taxpayer (R. 36-38) is reported in 107 F. Supp. 499. The opinion of the Court of Appeals (R. 46-50) is reported in 204 F. 2d 25.

JURISDICTION

The judgment of the Court of Appeals was entered on May 13, 1953. (R. 50.) The petition for

a writ of certiorari was filed on July 17, 1953. The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254.

QUESTION PRESENTED

Whether the taxpayer is entitled to the tax reduction benefits of Section 107 (a) of the Internal Revenue Code, as amended, with respect to a fee for legal services received in 1946, where the compensation taxpayer received was for services rendered during a period of about thirteen months.

STATUTE INVOLVED

Internal Revenue Code:

> SEC. 107 [As added by Sec. 220 (a), Revenue Act of 1939, c. 247, 53 Stat. 862, by Sec. 139 (a), Revenue Act of 1942, c. 619, 56 Stat. 798, and by Sec. 119 (b), Revenue Act of 1943, c. 63, 58 Stat. 21] COMPENSATION FOR SERVICES RENDERED FOR A PERIOD OF THIRTY-SIX MONTHS OR MORE AND BACK PAY.
>
> (a) *Personal Services.*—If at least 80 per centum of the total compensation for personal services covering a period of thirty-six calendar months or more (from the beginning to the completion of such services) is received or accrued in one taxable year by an individual or a partnership, the tax attributable to any part thereof which is included in the gross income of any individual shall not be greater than the aggregate of the taxes attributable to such part had it been included in the gross income of such individual ratably over that part of the

period which precedes the date of such receipt or accrual.

* * * * *

(26 U.S.C. 1946 ed., Sec. 107.)

STATEMENT

The facts as found by the District Court (R. 36-37) may be summarized as follows:

In September, 1941, one Thomas C. McConnell, an attorney, began work on a case which was subsequently litigated as *Bigelow* v. *RKO Radio Pictures*. It was argued and decided in the District Court, the Court of Appeals, and this Court. (R. 36.) In July, 1943, McConnell moved into the offices occupied by the taxpayer and three other attorneys. They shared office expenses, but not income, unless they agreed to work together on a particular case, and were not associated as partners. In February, 1945, more than three years after McConnell had started work on the case, and at his request, the taxpayer began working with McConnell in the preparation and litigation of the appellate phase of the case. (R. 36-37.) The case was finally decided by this Court[1] in February, 1946. A legal fee of approximately $120,000 was paid by the clients and the taxpayer received $20,000 as his share. In computing his federal income tax liability for 1946, the taxpayer allocated the fee over a period of fifty-three months, beginning with September, 1941, when McConnell alone had begun to

[1] *Bigelow* v. *RKO Radio Pictures*, 327 U. S. 251.

work on the case, allegedly pursuant to Section 107 (a) of the Internal Revenue Code. (R. 37.)

Upon an audit of the taxpayer's return, the Commissioner proposed a deficiency on the ground that the taxpayer was not entitled to the special relief provisions of Section 107. (R. 3-4.) The taxpayer paid the deficiency and later filed a claim for refund, which was disallowed. (R. 4.) Thereupon he instituted this suit for refund. (R. 3-5.) After the United States answered the complaint, the taxpayer filed a motion for summary judgment (R. 21) which the District Court denied on the ground that there remained an issue of fact, namely, whether an actual joint venture existed between the taxpayer and McConnell (R. 22-24). Upon hearing evidence on this issue, the District Court decided that a joint venture existed and rendered judgment for the taxpayer. (R. 36-38.) The Court of Appeals reversed the judgment of the District Court, holding that the taxpayer was not entitled to invoke the special benefits of Section 107 (a) even though there was a joint venture during the thirteen months taxpayer worked with McConnell. (R. 46-50.)

ARGUMENT

1. The decision of the court below is correct. The taxpayer here is invoking the tax reduction benefits of Section 107 (a) of the Internal Revenue Code, as amended (*supra*, pp. 2-3), which provides in substance that if at least 80% of the total compensation for personal services covering a period of thirty-six calendar months or more is received in one taxable

year by an individual or a partnership, the taxpayer should be taxed in that year as though the compensation had been spread over the period of the services, and an aliquot part had been added to his income in each of the component years. The purpose of the statute was to grant relief from the hardship falling upon persons who work for long periods of time without pay and then receive their compensation in a lump sum all in one year.[2] Since Section 107 (a) is a relief provision in the nature of an exemption, the taxpayer must show that he comes squarely within the terms of the statute. *Lindstrom* v. *Commissioner,* 149 F. 2d 344, 346 (C.A. 9th); *Smart* v. *Commissioner,* 152 F. 2d 333, 335 (C.A. 2d), certiorari denied, 327 U.S. 804. See also *New Colonial Co.* v. *Helvering,* 292 U.S. 435, 440; *White* v. *United States,* 305 U.S. 281, 292; *McDonald* v. *Commissioner,* 323 U.S. 57, 60.

The evidence in this case clearly shows that the $20,000 received by the taxpayer in 1946, the taxable year, was compensation for legal services with respect to the appellate phase of the *Bigelow* litigation. For that phase of the case, the taxpayer and McConnell formed a joint venture or partnership, which started in February, 1945, and ended in February, 1946, thus covering a period of about thirteen months. (R. 27-28, 29, 34, 48.) Inasmuch as Section 107 (a) expressly provides that the compensation received by the individual must be for personal services covering a period of thirty-

[2] S. Rep. No. 648, 76th Cong., 1st Sess., p. 7 (1939-2 Cum. Bull. 524, 528-529).

six months or more, the taxpayer failed to meet one of the essential requirements of the statute and therefore is not entitled to invoke its benefits. See *Smart* v. *Commissioner, supra; Civiletti* v. *Commissioner,* 152 F. 2d 332 (C.A. 2d), certiorari denied, 327 U.S. 804; *Whitman* v. *Commissioner,* 178 F. 2d 913 (C.A. 2d); *Cowan* v. *Henslee,* 180 F. 2d 73 (C.A. 6th); *Sovik* v. *Shaughnessy,* 191 F. 2d 895 (C.A. 2d); *Lindstrom* v. *Commissioner, supra.*

It is true, as the taxpayer contends (Br. 9), that the statute does not require that a taxpayer personally render the services, provided he is a member of a partnership that did render the services over the requisite three-year period. In the present case, however, the only services rendered by the joint venture or partnership were performed during a period of thirteen months, and the taxpayer's share of the partnership income did not embrace any services performed earlier. The services rendered during the prior period were performed by the taxpayer's associate in an individual capacity and, as is plain from the manner in which the fee was divided and as the Court of Appeals correctly observed (R. 48), the taxpayer did not share in the compensation earned by his associate in his individual capacity during the earlier period when the litigation was in its trial stage.

2. There is no conflict of decisions. *Commissioner* v. *Marshall,* 185 F. 2d 674 (C.A. 3d), affirming *per curiam,* 14 T.C. 90, and *Commissioner* v. *Nielson,* 187 F. 2d 233 (C.A. 9th), affirming the

Tax Court's decision of January 26, 1950 (1950 P-H T.C. Memorandum Decisions, par. 50,024), which are asserted by the taxpayer to be opposed by the decision below (Pet. 4; Br. 8-9), are plainly distinguishable from the present case. In each of those cases services had been performed by a partnership over the period required by the statute and the taxpayers, as members of the partnership (though joining the partnership after commencement of the partnership services in question and less than thirty-six-months prior to receipt of the payment for those services), received a portion of the partnership income derived from such partnership services. Even though the taxpayers in the *Marshall* and *Nielson* cases did not personally perform services over the entire period, they were held entitled to the benefits of Code Section 107. In the present case, however, as we have already observed, there was no partnership in existence and no partnership services were performed over the requisite three-year period. Moreover, unlike the *Marshall* and *Nielson* cases, where the taxpayers did receive a portion of the income earned by the earlier services of the partnership, the taxpayer here did not receive any income relating to the earlier services performed by his associate as an individual. A decision of the Second Circuit involving the application of Section 107 (a) squarely holds that the partnership must perform the services for which it receives the compensation. *Sovik* v. *Shaughnessy,* 191 F. 2d 895. As the court below decided (R. 49), the present case is closer to the

Sovik case than it is to the *Marshall* and *Nielson* cases.

The third case relied upon by the taxpayer to show a conflict, *Hofferbert* v. *Marshall*, 200 F. 2d 648 (C.A. 4th) (Pet. 4; Br. 9), deals with the question whether a husband and wife may, in a joint return, claim the benefits of Section 107 with respect to an item of income earned by the husband. Since the present case does not involve a joint return filed by husband and wife, it is substantially different from *Hofferbert* v. *Marshall*.

There are no cases which hold that, under circumstances similar to those involved here, a taxpayer is entitled to tack a period of services rendered by another individual to a subsequent period of services performed jointly by the taxpayer and such individual. There is, in short, no conflict of decisions requiring resolution by this Court.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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